89-324

NO.

FILED

AUG 22 1989

JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

P*I*E NATIONWIDE, INC.,
Petitioner,

v.

BOBBY WAYNE PERRY, PHILIP ANTHONY EDDIE ERNEST CORDELL JONES, JAMES A. MATHIS AND GARY R. HYDER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether plaintiffs' state law claims for fraud, coercion, misrepresentation and promissory estoppel concerning the procurement of their consent to participate in an employee stock ownership plan ("ESOP") regulated by ERISA are sufficiently related to the plan itself to be preempted by Section 514(a) of ERISA, 29 U.S.C.A. Section 1144(a), when all plaintiffs are participants in the plan.

2. Whether the preemption provision set forth in Section 514(a) of ERISA, (and hence ERISA's disclosure requirements and fiduciary responsibilities), applies during the formation and offering of an ERISA employee welfare benefit plan.

PARTIES TO PROCEEDING IN COURT BELOW

The petitioner in this proceeding is P*I*E Nationwide, Inc., (hereinafter "P*I*E"). P*I*E is a Florida corporation qualified to do and doing business in the State of Tennessee. P*I*E was the defendant in the district court below. The respondents are Bobby Wayne Perry, Philip Anthony Eddie, Ernest Cordell Jones, James A. Mathis, and Gary R. Hyder, plaintiffs below, all of whom are past or present employees of P*I*E Nationwide, Inc. at its freight terminal in Nashville, Tennessee.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitoner, P*I*E Nationwide, Inc., respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit entered in this action on April 10, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Perry v. P*I*E Nationwide, Inc.*, at 872 F.2d 157 (6th Cir. 1989), and is attached hereto as Appendix A. The Report and Recommendation of the Magistrate entered on November 25, 1986, and the Orders and Judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, which were not officially published, are attached hereto as Appendix B. C, and D, respectively.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 10, 1989. A timely Petition for Rehearing filed by P*I*E was denied on May 25, 1989 (see Appendix E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) (1982). On June 1, 1989, the Sixth Circuit granted P*I*E's Motion to Stay the Mandate in this action for sixty (60) days pending this Petition for Writ of Certiorari.

STATUTES INVOLVED

This case involves several provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001 *et seq.* (1985). Principally concerned is Section 514(a) of ERISA, 29 U.S.C. Section 1144(a), which in relevant part provides:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

Section 514(c), 29 U.S.C. Section 1144(c), states in relevant part:

> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law of any State.
>
> . . .
>
> (2) The term "State" includes a state . . . which

> purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

Section 502 of ERISA, 29 U.S.C. Section 1132, provides:

> A civil action may be brought by a participant or beneficiary . . . to recover benefits, . . . to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . . to enjoin any act or practice which violates any provision of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this title or the terms of the plan.

In Section 2(a) of ERISA, 29 U.S.C. Section 1001(a), which articulates the Congressional findings and declaration of policy concerning employee benefit plans, it is stated:

> The Congress finds . . . that the operational scope and economic impact of such plans is increasingly interstate; . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Section 407(d)(6) of ERISA, 29 U.S.C. Secton 1107(d)(6), provides:

> The term "employee stock ownership plan" means an individual account plan:

(a) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under Section 401 of the Internal Revenue Code of 1954, and which is designed to invest primarily in qualifying employee securities, and
(b) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

STATEMENT OF THE CASE

This action was brought in 1986 by five plaintiffs based upon various Tennessee common law claims of alleged fraudulent inducement in obtaining their participation in an ERISA employee welfare benefit plan. P*I*E's motion to dismiss was based upon the defense that the Tennessee claims were preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974 (herein "ERISA"), 29 U.S.C. Section 1144(a) (1985).

Plaintiffs sued P*I*E in the district court at Nashville based upon diversity of citizenship because petitioner is a Florida corporation which does business within the State of Tennessee. The complaint asserted that P*I*E wrongfully induced plaintiffs to participate in an Employee Stock Investment Plan (hereinafter the "SIP"), contrary to Tennessee state common law. Plaintiffs also alleged that their participation in the ERISA plan was obtained through fraud, coercion, misrepresentation, promissory estoppel, lack of consideration, and breach of fiduciary duty. Plaintiffs requested rescission or damages.

P*I*E sought to dismiss because the plan was an employee stock ownership plan ("ESOP") as contemplated under Section 407(d)(6) of ERISA, 29 U.S.C. Sec-

tion 1107(d)(6), and the Internal Revenue Code, 29 U.S.C. Section 4975(e)(7). As an ESOP, the SIP is regulated by the terms of ERISA and the Internal Revenue Code. This regulation extends to employer conduct during the offering of participation in the welfare benefit plan.

For the purposes of this appeal, the factual background of this controversy is essentially undisputed.[1] P*I*E is a long distance motor carrier operating throughout the United States and in parts of Canada. In the fall of 1985, when the SIP came into being, P*I*E had approximately 11,000 employees and maintained over 300 truck terminals. It experienced over $90,000,000 in operating losses during 1984 and the first half of 1985. P*I*E was in "dire economic straits." In an effort to improve its weak financial condition, P*I*E offered the SIP which was "designed to enable employees to acquire stock ownership in the company, and to provide employees who participated with the opportunity to accumulate capital for their future economic security." The SIP also substantially reduced P*I*E's operating expenses. The SIP was "expressly subject" to ERISA. Defendant issued a lengthy prospectus which was filed with the Securities and Exchange Commission. All eligible employees were given a fifteen page plan outline which summarized the "material contained [in the aforesaid SIP] prospectus."[2] To participate in the SIP, an employee had to agree to accept an "irrevocable 15% reduction in wages or salary from the

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[1] This statement of facts is contained in the Magistrate's report. It was in the briefs of both parties in the appeal to the Sixth Circuit and is contained in the opinion appealed from.

[2] This outline or summary was "qualified in its entirety by reference to the detailed information contained in such prospectus."

start of the program through December 31, 1990."[3]

Plaintiffs were employed by P*I*E at its Nashville, Tennessee freight terminal. Between September and November of 1985, each voluntarily signed an agreement to participate in the SIP, which contained the following provision:

> I understand and agree that participation in the Compensation Program means that my wages or salary (as now or hereafter in effect) will be reduced by 15 percent beginning on the date the Compensation Program becomes effective, continuing through December 31, 1990.
>
> I acknowledge receipt of a Prospectus relating to the offering of Ryder/P*I*E Common Stock under the Stock Investment Plan and the Compensation Program.
>
> I elect to participate in the Compensation Program and in the Stock Investment Plan of Ryder/P*I*E Nationwide, Inc.[4]

P*I*E was sold to Maxitron, Inc. on January 1, 1986, just a few months after plaintiffs elected to join the SIP. Approximately 85 percent of eligible employees had similarly elected to join the SIP, which became effective

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[3] Certain collective bargaining unit employees, however, might participate at a 5 percent reduction. This 15-5 percent distinction is not challenged in the instant litigation.

[4] Effective January 1, 1986, Ryder/P*I*E Nationwide, Inc. changed its name to P*I*E Nationwide, Inc.

December 31, 1985.[5] "The wage reduction could not be revoked or changed during participation," and was "intended to be irrevocable." Plaintiffs claim they were told by P*I*E representatives that the company would close because of its poor financial condition if employees did not participate in the SIP and that "[d]efendant corporation under no circumstances would be sold."[6] The SIP, however, contained one provision indicating that no representations, beyond those in the prospectus itself, were authorized, and another provision specifically referring to a possible sale of P*I*E stock. Plaintiffs concede that the SIP contained participation, funding, and vesting requirements "as provided in ERISA," and the district court found the SIP qualified under ERISA. Plaintiffs did not seek to exhaust their administrative remedies under the SIP before bringing suit in the district court.

The district court denied P*I*E's motion to dismiss on ERISA preemption grounds. The Sixth Circuit reversed in part and affirmed in part the district court, finding that the claims of breach of fiduciary duty and lack of consideration were preempted, while the claims of fraud, misrepresentation and promissory estoppel were not. The Sixth Circuit panel reasoned that preemption should only apply if Congress has provided a remedy for the wrong or wrongs asserted. Since it was uncertain that the remedies the plaintiffs sought—rescission and refund of wage reductions—were available to them under ERISA, the Court of Appeals found that ERISA did not preempt those claims.

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[5] The SIP provided the plan was conditioned upon at least 70 percent of the company's 11,000 employees electing to participate.

[6] Plaintiffs' affidavits indicated only that "upper-level management representatives told them that the company was not for sale" because of its bad financial conditions.

REASONS THE WRIT SHOULD BE GRANTED

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *SHAW V. DELTA AIR LINES, INC.*, 463 U.S. 85 (1983) AND *PILOT LIFE INSURANCE CO. V. DEDEAUX*, 481 U.S. 41 (1987), THAT ERISA PREEMPTS ANY STATE LAW CLAIM THAT "RELATES TO " AN ERISA PLAN.

It is clear that this Court has given ERISA an extremely broad construction with respect to its preemptive effect on state law and state actions that "relate to" an employee benefit plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *MacKey v. Lanier Collection Agency & Service, Inc.*, 108 S. Ct. 2182 (1988); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). The circuit courts of appeal, however, have diverged in their application of ERISA's preemptive effect to state law-based claims concerning the circumstances surrounding decisions to participate in such plans.

In the instant appeal, the Sixth Circuit concluded that ERISA preemption is to be determined by deciding whether or not ERISA provides the specific sort of remedies sought by the plaintiffs through their state law-based claim. This approach is directly contrary to this Court's finding in *Shaw v. Delta Air Lines, Inc., supra*, that the preemptive sweep of ERISA was not limited to "state laws as specifically designed to affect employee benefit plans," or to "state laws dealing with the subject matters covered by ERISA". 463 U.S. at 98. Indeed, if ERISA preempted only state laws which provided remedies parallel to those in ERISA, this Court would never have found the state law at issue in *Shaw* to have preempted. In *Shaw*, the plaintiffs' claim for pregnancy benefits under New

York's Human Rights Law was found to "relate to" an employee benefit plan within the meaning of Section 514(a). Had this Court applied the Sixth Circuit panel's "adequate remedy" test, it could never have reached the conclusion reached in *Shaw*, as ERISA has no remedial provision even remotely addressing the issue of discrimination in benefits on account of pregnancy.

Shaw makes clear the the preemption clause cannot be interpreted to preempt only state laws dealing with the subject matters covered by ERISA. Instead, the clause's preemptive scope is "as broad as its language." *Id.* at 98. The clause extends to any attempt to relate state law either directly or indirectly to an employee benefit plan. *Id.* at 99-100.

In *Pilot Life Insurance Co. v. Dedeaux, supra*, this Court had occasion to again direct its attention to the "relate to" phrase. According to the Court, the phrase "was given its broad common-sense meaning such that a state law relate[s] to a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." 481 U.S. at 47, (quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1984)). *Pilot Life* makes clear that the ERISA civil enforcement provisions have a complete preemptive effect. In such a situation, the preemptive force is "so powerful as to displace entirely any state cause of action . . . ." *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (referring to *Avco Corp. v. Acro Lodge No. 735*, 390 U.S. 557, (1968), in which the Court affirmed the controlling effect federal law has over any action to enforce an agreement within the scope of Section 301 of the Labor Management Relations Act). *Pilot Life* reiterates this Court's pronouncement that ERISA preemption is to be applied broadly, to preempt

any claim that "relates to" an employee benefit plan.

Rather than recognizing these more recent pronouncements concerning ERISA's preemptive scope, however, the court below relied upon a more dated Eighth Circuit decision, *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981), to wrongly conclude that the remedy sought determines whether or not ERISA preempts attempts to relate state law to an employee benefit plan. In *Dependahl* (where ironically ERISA was found to preempt a state law claim), it was held that ERISA only preempts state law causes of action when Congress has specifically provided a remedy for the alleged wrong. *Id.* at 1215. Decided years prior to *Shaw* and *Pilot Life*, *Dependahl* represents a constricted view of ERISA's preemptive scope and clearly conflicts with this Court's more recent articulations of Congress' sweeping intent behind including a preemption clause within ERISA. Compare *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987), (where a state law-based attempt to orally modify the terms of an ERISA employee benefit plan was found to be preempted). Allowed to stand unchallenged, the decision and holding of the court below will create unnecessary confusion over this important federal issue and will create uncertainty over the extent of ERISA's preemptive sweep. It will create a new loophole in the preemption clause which this Court had closed by its decisions in *Shaw* and *Pilot Life* and through which creative plaintiffs will drive the very myriad of state law based claims previously foreclosed by this Court's more recent holdings.

Perhaps even more critical is the fact that if the Sixth Circuit's decision is allowed to stand, ERISA's preemptive scope would not extend to the offering of employee benefit plans to employees by employers engaged

in interstate commerce. In its statement of findings and declarations of policy concerning employee plans, Congress expressly stated that it intended to create federal safeguards with respect to the "establishment" of such plans. 29 U.S.C. Section 1001(a). The Sixth Circuit would remove from exclusive federal regulation the offering of such plans, contrary to Congress' stated intent that employee benefit plan establishment is to be regulated by ERISA and not state law.

In summary, the decision below is in conflict with the applicable decisions of this Court. If allowed to stand, *Shaw* and *Pilot Life* will be limited far beyond their intent.

II. THE DECISION BELOW FOLLOWING THE EIGHTH CIRCUIT, IS IN DIRECT CONFLICT WITH THE FIFTH, TENTH, AND ELEVENTH CIRCUITS.

In *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), the United States Court of Appeals for the Fifth Circuit determined that a state law breach of contract action to recover additional pension benefits is preempted under the provisions of 29 U.S.C. Section 1144(a):

> It is clear that ERISA preempts state law causes of action as they relate to employee benefit plans. This is true even though the cause of action arises under a "general" state law which in and of itself has no impact on employee benefit plans.

Id. at 1292 n.5.

Cefalu contended in his suit that representatives of Goodrich orally assured him that his retirement benefits as a franchisee would be identical to those of individuals who had accepted employment with Goodrich. Relying upon

those representations, Cefalu contended that he purchased a franchise, instead of electing to work for Goodrich. *Id.* at 1292. After purchasing the franchise, Cefalu alleged that Goodrich advised him that his benefits would not be the same as those who chose to work for Goodrich as employees. *Id.* Suit was then filed in state court by Cefalu alleging breach of contract under Louisiana law. *Id.* Goodrich denied that any oral representations or assurances were given to Cefalu to induce him to purchase the franchise. The franchise contained a merger clause and a statement that the agreement had been entered into only upon the inducements contained within the document, and no others. *Id.*

In affirming the district court's grant of summary judgment to Goodrich on ERISA preemption grounds, the Fifth Circuit noted:

> [T]he question whether a certain state action is preempted by federal law is one of congressional intent.

Id. at 1293.

In light of the decision of the Court of Appeals for the Sixth Circuit in the instant appeal, a conflict exists among the circuits as to the important federal question of whether or not oral misrepresentations concerning an ERISA employee benefit plan are preempted.

The decision below is also in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988). There, an employee filed a negligence and breach of contract suit because of his employer's failure to grant him an increase in pension

benefits. Straub also contended that his employer misrepresented how his pension benefits would be affected by a transfer of his employment to a subsidiary company of his employer. *Id.* at 1263. The Tenth Circuit found ERISA preempted the state law claims:

> With the weight of Supreme Court and appellate opinion to the contrary, Straub's argument that ERISA cannot preempt claims that are primarily contractural in nature must fail.

Id. at 1264.

The Tenth Circuit expressly held that no liability exists under ERISA for purported oral modification of the terms of an employee benefit plan. *Id.* at 1265 (relying upon *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986)). In *Nachwalter*, the Eleventh Circuit concluded that the requirement that ERISA plans be maintained in writing precludes claims of oral modification to the plan and that state common law doctrines of estoppel cannot be used to alter that result. *Id.*

According to the decision below, the Sixth Circuit panel would allow oral modification of the SIP or a cause of action under state law for the oral modification of an ERISA welfare benefit plan. This modification would occur through giving effect to the alleged oral misrepresentations of the plan by company officials to the plaintiffs at the time the plan was offered to them.

The decision below is in direct conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). The difference in the potential remedies available under state and federal law was specifically addressed recently by the Eleventh

Circuit in *Phillips*, a decision which the panel below expressly declined to follow. In that decision, the Eleventh Circuit concluded:

> The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. This is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit actions formally prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based.

Id. at 1470.

In *Phillips*, former employees of Amoco Oil Company brought an action based on a claim of breach of contract, state common law fraud, and ERISA violations. *Id.* at 1466. They claimed that Amoco fraudulently assured them of lifetime employment even while negotiating the sale of the business to another company. They also contended that the fraudulent concealment of the effect of the sale on credit for years of service toward retirement benefits was not preempted by ERISA. *Id.* the Eleventh Circuit found both claims to be preempted. *Id.* at 1473.

The decision below is also in direct conflict with the very recent decision of The United States Court of Appeals for the Eleventh Circuit in *Farlow v. Union Central Life Insurance Co.*, 874 F.2d 791 (11th Cir. 1989). In *Farlow*, the Eleventh Circuit affirmed a district court's determination

that state law claims for, *inter alia*, fraudulent misrepresentation arising out of the sale of an insurance policy were preempted by ERISA. Farlow alleged that a Central Life employee fraudulently misrepresented the terms of a group health and employee term life insurance plan to induce him to purchase the plan. *Id.* at 793. The district court and court of appeals found the scope of ERISA preemption sufficiently broad to encompass the misrepresentation claim. *Id.* In so holding, the Eleventh Circuit noted:

> We have held that ERISA preempts state laws even if the laws do not expressly concern employee benefit plans but rather amount only to indirect regulation of such plans.

Id. at 794 (citations omitted).

Under the decision below, the Sixth Circuit panel would allow Tennessee State law to indirectly regulate the SIP, contrary to the holding of the Eleventh Circuit in *Farlow*.

In summary, the Sixth and Eighth Circuits hold that ERISA only preempts state law based claims for which there is an "available remedy" under ERISA. The Fifth, Tenth, and Eleventh Circuits on the other hand hold that ERISA preempts all claims which attempt to relate state laws to ERISA employee benefit plans. A split exists among the circuits as to an important federal question. Moreover, the decision of the Court of Appeals below and of the Eighth Circuit in *Dependahl*, departs from the clearly established precedents of this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner P*I*E Nationwide, Inc. respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit in order to resolve a conflict among the circuits as to this important federal question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this 21st day of August, 1989 by first class United States mail upon the following:

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APPENDIX A

Bobby Wayne PERRY, Philip Anthony Eddie, Ernest Cordell Jones, James A. Mathis, and Gary R. Hyder, Plaintiffs-Appellees,

v.

P*I*E NATIONWIDE, INC., Defendant-Appellant.

No. 87-6321

United States Court of Appeals, Sixth Circuit.

Argued Sept. 26, 1988.

Decided April 10, 1989.

Employees brought action against employer for fraudulent inducement in obtaining participation in employee benefit plan, and sought rescission of plan and restitution of agreed wage reduction. The United States District court for the Middle District of Tennessee, Thomas A. Higgins, J., denied employer's motion to dismiss, and employer appealed. The Court of Appeals, Wellford, Circuit Judge, held that: (1) employees' claims for breach of fiduciary duty and lack of consideration for pay cut taken to participate in benefit plan were preempted by Employee Retirement Income Security Act, and (2) employees' claims relating to fraud, misrepresentation, coercion, and promissory estoppel with respect to obtaining their agreement to participate in benefit plan and acceptance of irrevocable pay cut were not preempted by Act.

Affirmed in part; reversed in part.

David A. Nelson, Circuit Judge, filed opinion concurring in part and dissenting in part.

Peter Reed Corbin (argued), Corbin & Dickinson, John E. Duvall, Jacksonville, Fla., Thomas M. Donnell, Jr., Stewart Estes & Donnell, Nashville, Tenn., for defendant-appellant.

R. Steven Waldron, R. Steven Waldron & Associates, Murfreesboro, Tenn., John D. Schwalb (argued), Brewer, Krause, & Brooks, Nashville, Tenn., for plaintiffs-appellees.

Before WELLFORD and NELSON, Circuit Judges, and McQUADE*, District Judge.

WELLFORD, Circuit Judge.

This case comes to us on appeal from the district court's denial of defendant P*I*E Nationwide, Inc.'s (P*I*E) motion to dismiss this action of five plaintiffs based on a common law claim of alleged fraudulent inducement in obtaining their participation in an employees' benefit plant. P*I*E's motion was based on the defense that the state law claims were preempted by reason of 29 U.S.C. § 1144(a), § 514(a) of ERISA. Plaintiffs sued defendant in the district court at Nashville based on diversity of citizenship because defendant was a Florida corporation qualified to do business in Tennessee. The complaint asserted that defendant wrongfully induced plaintiffs to participate in an employee stock investment plan (SIP). Plaintiffs also alleged that their participation was obtained through fraud, coercion, misrepresentation, promissory estoppel, lack of

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* The Honorable Richard B. McQuade, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

consideration, and breach of fiduciary duty. Plaintiffs requested rescission or damages. P*I*E sought to dismiss because the plan was an employee stock ownership plan (ESOP) as contemplated under § 407(d)(6) of ERISA, 29 U.S.C. § 1107(d)(6),[1] and the Internal Revenue Code, 26 U.S.C. § 4975(e)(7).

The factual background of this controversy is essentially undisputed. P*I*E is a long-distance motor carrier operating throughout the United States and in part of Canada. In the fall of 1985, when the SIP came into being, P*I*E had approximately 11,000 employees and maintained over 300 truck terminals. It had experienced over $90,000,000 in operating losses during 1984 and the first half of 1985. The company was, to say the least, in "dire economic straits." In an effort to improve its weak financial condition, P*I*E offered the SIP, which was "designed to enable employees to acquire stock ownership in the Company, and to provide employees who participated with the opportunity to accumulate capital for their future economic security." The SIP was "expressly subject" to ERISA.[2] Defendant issued a lengthly prospectus which was filed with the Securities and Exchange Commission.

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[1] This appeal primarily pertains to the preemption clause in 29 U.S.C. § 1144:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not excempt under section 1003(b) of this title.

29 U.S.C. § 1144(a).

[2] This statement of facts is contained in the magistrate's report and in the briefs of both parties.

All eligible employees were given a fifteen-page plan outline which summarized the "material contained in [the aforesaid SIP], prospectus."[3] To participate in the SIP, an employee had to agree to accept an "irrevocable 15 percent reduction in wages or salary from the start of the program through December 31, 1990."[4]

Plaintiffs were stationed at the Nashville P*I*E terminal, and all but one (Eddie) had more than ten years experience. Between September and November 1985, each signed an agreement to participate in the SIP, which contained the following provision:

> I understand and agree that participation in the Compensation Program means that my wages or salary (as now or hereafter in effect) will be reduced by 15 percent beginning on the date the Compensation Program becomes effective, continuing through December 31, 1990. I acknowledge receipt of a Prospectus relating to the offering of Ryder/P*I*E Common Stock under the Stock Investment Plan and the Compensation Program.
>
> I elect to participate in the Compensation Program and in the Stock Investment Plan of Ryder/P*I*E Nationwide, Inc.[5]

P*I*E was sold to Maxitron, Inc. on January 1,

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[3] This outline or summary was "qualified in its entirety by reference to the detailed information contained in such prospectus."

[4] Certain collective bargaining unit employees, however, might participate at a 5 percent reduction. This 15 percent-5 percent distinction is not challenged in the instant litigation.

[5] Effective January 1, 1986, Ryder/P*I*E Nationwide, Inc. changed its name to P*I*E Nationwide, Inc.

1986, just a few months after plaintiffs elected to join the SIP. Approximately 85% of eligible employees had similarly elected to join the SIP, which became effective December 31, 1985.[6] "The wage reduction election could not be revoked or changed during participation," and was "intended to be irrevocable."[7] Plaintiffs claim that they were told by P*I*E representatives that the company would close because of its poor financial condition if employees did not participate in the SIP and that "[d]efendant corporation under no circumstances would be sold."[8] The SIP, however, contained one provision indicating that no representations, beyond those in the prospectus itself, were authorized, and another provision referring to a possible sale of P*I*E stock. Plaintiffs concede that the SIP contained participation, funding, and vesting requirements "as provided in ERISA," and the district court found that the SIP qualified under ERISA. Plaintiffs did not seek to exhaust their administrative remedies under the SIP before bringing suit in the district court.

Defendant's motion to dismiss, based upon ERISA preemption, was referred to a magistrate, who recommended that it be denied. He concluded that the cause of action related to "the manner in which this defendant procured the plaintiffs' agreements to withhold money from their pay" rather than "to the administration of the ESOP," or to "benefits under the stock option plan."[9] He also stated

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[6] The SIP provided that the plan was conditioned upon at least 70% of the company's 11,000 employees electing to participate.

[7] These findings of the magistrate were not contested by either party.

[8] Plaintiffs' affidavits indicated only that "upper-level management representatives told them that the Company was not for sale" because of its bad financial condition.

[9] Memorandum of the district court, Joint Appendix at 32.

that "§ 1144(a) does not apply to the common law causes of action to determine whether or not the plaintiffs were coerced by fraud or misrepresentation to join the benefit plan."[10]

The district court agreed with the magistrate's recommendation, and held that "[p]reemption by ERISA only applies once the benefit plan is in existence," and does not apply to alleged common law actions of fraud or misrepresentation "to get the plaintiffs to join the plan."[11] Judge Higgins also held that "Section 1132(a) is not applicable to this action," because it does not "deal with an administrator's or fiduciary's duties or breach of duties under the plan."[12]

It is clear that the Supreme Court has given ERISA a broad construction with respect to its preemptive effect on state law and state actions that "relate to" an employment benefit Plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *Mackey v. Lanier, Collection Agency & Service, Inc.*, ____ U.S. ____, 108 S.Ct. 2182, 2185, 100 L.Ed.2d 836 (1988); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1551-52, 95 L.Ed.2d 39 (1987) (observing that "the express pre-emption provisions of ERISA are deliberately expansive"). We have held, consistent with this interpretation, that "Congress used 'relate to' in its broadest sense." *Authier v. Ginsberg*, 757 F.2d 796, 800 (6th Cir.) (citing *Shaw*, 463 U.S. at 98, 103 S.Ct. at 2900), *cert. denied*, 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 177 (1985); *see also Holland v. Burlington Industries, Inc.*, 772 F.2d 1140,

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[10] Memorandum of the district court, Joint Appendix at 32.

[11] Memorandum of the district court, Joint Appendix at 34.

[12] Memorandum of the district court, Joint Appendix at 38-39.

1147 (4th Cir.1985) (stating that § 1144(a) is a section of "unparallelled breadth"), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986). Whether plaintiffs' cause of action for what amounts to a fraudulent procurement of their consent to participate in the SIP is sufficiently *related* to the plan itself, or whether the relation, if any, is "too tenuous, remote, or peripheral a matter to warrant a finding that the [action] 'relates to' the plan," is the question before us. *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21.

> ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. . . . ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525, 101 S.Ct. 1895, 1907, 68 L.Ed.2d 402 (1981).

After discussing *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir.1985), the district court cited it as "finding that if an individual is neither a participant nor beneficiary then he does not fall within the sphere of ERISA."[13] Because the purported misconduct of P*I*E occurred before plaintiffs became participants or beneficiaries, and because they were not suing for benefits under the plan, the district court held that preemption did not apply. *Scott* concerned the employees' loss of severance and "prospective" benefits after Gulf sold the refinery to another company which agreed to continue the employment of former Gulf Oil employees. *Id.* at 1505. "The conduct giving rise to the claim was the negotiation of an employment contract

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[13] Memorandum of the district court, Joint Appendix at 40.

which prevented the existence of an employee benefit plan." *Id.* The *Scott* court held that the plaintiffs' state law claims were not preempted because they did "not raise any issues concerning the matters regulated by ERISA." *Id.* "The issues raised by the claim," stated the court, "are not different than those that would be raised by a claim that Gulf had conspired with [the buyer] to accept . . . lower wages, a claim that would clearly not be preempted by ERISA." *Id.* The court also indicated that the plaintiffs' claim for prospective benefits was closely analogous to the claim in *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.* 721 F.2d 654 (9th Cir.1983), in which an employee brought an action alleging that his employer fraudulently induced him to waive his right to participate in a pension plan. The *Freeman* court held that plaintiff's action could not be maintained under ERISA because the plaintiff, having waived participation in the plan, was not a "participant or beneficiary" as required by statute. The court also held that because the damages sought by the plaintiff were not "benefits under a plan," they could not be awarded in an ERISA action.

The district court also cited *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152(1985), which observed that "[o]nce established, ERISA operates to protect an employee's interest in the welfare benefit program." The district court noted that P*I*E's asserted wrongful act occurred before the SIP was established and thus, by inference, the language cited from *Blau* would make ERISA inapplicable.

A contrary decision was rendered in *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir.1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987). There, employees of Amoco asserted that their past

employer, Amoco, and Norgas, which bought a portion of Amoco's business and assets, fraudulently prevented them from negotiating with Norgas, their new employer, concerning whether their years of service with Amoco would be credited when calculating retirement benefits under the ERISA plan. 799 F.2d at 1469. *Phillips* held that the common law fraud claim was preempted under ERISA, but expressly limited the holding to the facts of the case. *Id.* at 1470 n.2. The basis of the holding was that the claim depended on "the existence of a duty to disclose, which necessarily depends on an interpretation of the fiduciary duties imposed by ERISA". *Id.* at 1470. The damages claimed, furthermore, stemmed from the loss of ERISA benefits, which were deemed to "relate to" the employee benefit plan in question. *Id.* The district court in the instant case did not mention *Phillips*, but neither did *Phillips* cite to the Ninth Circuit cases heretofore mentioned.

[1] One of the theories relied upon by plaintiffs in the amended complaint is that the defendant, as their employer, breached its fiduciary duty. This claim of breach of fiduciary duty is clearly foreclosed by ERISA. *See Shaw*, 463 U.S. at 98, 103 S.Ct. at 2900; *Phillips*, 799 F.2d at 1470; *Authier*, 757 F.2d at 802; *Ogden v. Michigan Bell Telephone Co.*, 571 F.Supp. 520, 523 (E.D.Mich.1983). Preemption applies to this particular claim because ERISA provides a specific remedy for breach of fiduciary duty with respect to establishment of an ERISA plan. *See* 29 U.S.C. §§ 1104, 1132(a). To this extent, therefore, we must overrule the decision of the district court.

[2] We are also convinced that the claim based on lack of consideration for the SIP undertaking, including the plaintiffs' agreement to take a salary cut, is so inherently and directly related to the SIP that it is preempted by ERISA. Claimed lack of consideration goes to the

substance of the undertaking, which is an "area of exclusive federal concern." *Alessi*, 451 U.S. at 525, 101 S.Ct. at 1907. We therefore overrule the decision of the district court on this issue, and hold that plaintiffs' claim based on lack of consideration is preempted.

[3] The more difficult claims relate to fraud, misrepresentation, coercion, and promissory estoppel with respect to obtaining plaintiffs' agreement to participate in the SIP and acceptance of an irrevocable pay cut. An earlier district court case, *Provience v. Valley Clerks Trust Fund*, 509 F.Supp. 388 (E.D.Cal.1981), held:

> [W]here the state law has only an indirect effect on the plan and where it is one of general application which pertains to an area of important state concern, the court should find there has been no preemption.

Id. at 391 (footnote omitted, emphasis in original). *See also Miller v. Lay Trucking Co.*, 606 F.Supp. 1326 (N.D.Ind. 1985) (holding that plaintiff's common law action for fraudulent inducement was not preempted by ERISA because the fraud occurred prior to the time plaintiff entered the plan and because the fraud claim did not directly affect the regulation of the ERISA plan). It may well be argued that state common law actions based on fraud, coercion, and promissory estoppel do concern important state interests and have general application to state causes of action rather than to federal claims.

Another case involving issues similar to those present in this dispute—an employee stock ownership program coupled with a 15 percent wage reduction for employees of a financially troubled airline— is *Childers v. Northwest Airlines, Inc.*, 688 F.Supp. 1357 (D.Minn.1988). Certain employees in that case, who were denied further

participation in the plan because of promotion, sued alleging fraud in the inducement and breach of contract. The court held:

> [T]he essence of their claim is that Republic breached its contract and fraudulently induced them to agree to wage concessions by failing to adopt plan requirements that would ensure equal participation in the ESOPs by all Republic employees. Such claims are "related to" a plan regulated by ERISA in the "broad common-sense meaning," *Shaw*, 463 U.S. at 97, 103 S.Ct. at 2900, of that phrase, and are, therefore, preempted by ERISA.

688 F.Supp. at 1364.

The *Childers* court, unlike the district court in the instant case, rejected plaintiffs' argument that their claims were "founded on acts preliminary to the adoption and creation of the ESOPs and, therefore, do not have any connection or reference to any employee benefit plan." *Id.*.

Mid America Hotel Corp. v. Bernstein, 664 F.Supp. 384 (N.D.Ill.1987), reached a result similar to *Childers* by finding a fraudulent inducement claim to be preempted because it was intertwined with a claim for breach of fiduciary duty. *Id.* at 386.

Preemption was also found in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), a case involving employees' claims for tortious interference with a contract relating to an employee benefit plan. *Dependahl* held that preemption of state common law claims, such as tortious interference, applies when (1) Congress has indicated an intent to "occupy the field," and (2) Congress has provided a remedy for the alleged wrong. 653 F.2d at

1215. See, to this same effect, *Ogden v. Michigan Bell Telephone Co.*, 571 F.Supp. 520, 523 (E.D. Mich.1983).

Resolution of the second of these *Dependahl* standards depends upon an interpretation of 29 U.S.C. § 1132, the ERISA civil enforcement provision. Section 1132(a)(3) provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any pro vision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Here, plaintiffs seek a rescission of the plan and restitution of the agreed wage reduction. Neither party has cited any case indicating that § 1132 provides a remedy of the type sought by the plaintiffs. Plaintiffs, unlike the complainants in some of the cases cited or discussed above, do not seek plan benefits or an increase in plan benefits; rather, they seek not to be bound as participants and thus to recoup their wage reductions. (*Childers* claimants, for example, sought claims for benefits under the ESOP, an ERISA plan, and disputed their elimination from participation).

It may be seen that there is respectable authority for positions taken by both parties in this case concerning preemption of state common law claims of fraud, misrepresentation, and promissory estoppel. This court has not previously ruled on this issue. We are disposed, however, toward the reasoning of *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), that preemption should apply to a state law claim only if Con-

gress has provided a remedy for the wrong or wrongs asserted. Giving plaintiffs the benefit of some doubt in this respect, we are uncertain whether 29 U.S.C. § 1132 provides, under the circumstances of this case, an adequate remedy to redress the wrongs claimed, specifically, rescission and refund of wage reductions. We therefore AFFIRM the action of the district court in concluding there was no ERISA preemption, but only with respect to the fraud, misrepresentation, and promissory estoppel[14] claims.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

If the plaintiffs' claims or fraud, misrepresentation, and promissory estoppel have not been preempted under ERISA—and I agree with the court's resolution of that close question—it does not seem to me that the remaining claims (breach of fiduciary duty and lack of consideration) can fairly be said to have been preempted either.

The source of the fiduciary duty to which the employer was alleged to have been subject is unrelated to the benefit plan. The amended complaint alleges simply that "a fiduciary duty to fairly, openly and honestly disclose pertinent and material facts" arose because the plaintiffs, as the defendant is claimed to have known, "were in an inherently unequal bargaining position with defendant," and the plaintiffs "had placed trust and confidence in Defendant to act fairly and in good faith toward Plaintiffs." The supposed fiduciary duty thus has nothing to do with the administration of the plan or the payment of benefits under it—and I cannot see that the alleged duty to

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[14] We are not called upon to decide at this juncture the effect of the plan language that no oral promises outside the plan or prospectus were to be binding.

make full disclosure is any more closely related to the plan than is the duty not to make affirmative misrepresentations. If the alleged violation of the latter duty is not covered by ERISA, I do not understand why the alleged violation of the former is.

Turning to the supposed lack of consideration, I have no doubt that the claim would have been preempted had the plaintiffs asserted that they failed to receive the shares of stock promised them under the plan. As I read the amended complaint, however, that is not what the plaintiffs are contending. The plaintiffs do not deny that they have been earning stock in the company on a daily basis, and the defendant's affidavit shows they have been; it is "uncontroverted," as the magistrate noted, that the plaintiffs have been credited with stock ownership consistent with their pledges. The lack of consideration claim makes no sense to me, but if the plaintiffs are not contending that they failed to receive the stock to which the benefit plan entitles them, I do not think the claim is covered by ERISA.

I would affirm the judgment of the district court on all counts.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
800 UNITED STATES COURTHOUSE

OFFICE OF THE CLERK

DATE: 11-26-86
RE: 3:86-0423-Higgins
Enclosed is a copy of:
REPORT & RECOMMENDATION
signed by the Judge on
11-25-86

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and entered on the docket by the Clerk on
11-26-86

CLERK, U.S. District Court

by: BARBARA VAUGHN
Deputy Clerk

Enclosure

xc: Lara W. Short
Thomas M. Donnell, Jr.
Peter Reed Corbin

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
NOV 25 1986

BOBBY WAYNE PERRY, PHILIP ANTHONY EDDIE, ERNEST CORDELL JONES, JAMES H. MATHIS and GARY R. HYDER	)	
v.	)	NO. 3-86-0423
P*I*E NATIONWIDE, INC.	)	

TO: Honorable Thomas A. Higgins, District Judge

REPORT AND RECOMMENDATION

On August 11, 1986, the Court referred this civil action to the undersigned for consideration of the defendant's motion to dismiss or in the alternative for summary judgment, and for the submission of proposed findings of fact and recommendations for disposition of said motion.

The plaintiffs are employees of the defendant at its Nashville terminal facility, and they filed this action on May 8, 1986, alleging various state law claims concerning the manner by which the defendant induced them to agree to participate in an employee stock investment plan. The plaintiffs seek the return of the money withheld from their wages for investment in the plan plus interest, and to have the plan contracts which they executed declared void. The plaintiffs allege jurisdiction pursuant to 28 U.S.C. § 1332, in that there is diversity of citizenship between all plaintiffs and the defendant, and that the amount in controversy exceeds the jurisdictional amount.

The defendant's motion raises one primary issue: Are the plaintiffs' various state common law causes of action preempted by the Employee Retirement Income Secruity Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*?

In its motion the defendant contends that the defendant's employee stock investment plan is an employee stock option plan as contemplated under ERISA, 29 U.S.C. § 1107(d)(6), and the Internal Revenue Code, 26 U.S.C. § 4975(e)(7). The defendant argues that since the stock investment plan is a benefit plan subject to ERISA's coverage provisions, the plaintiffs' statelaw claims are preempted by 29 U.S.C. § 1144 (a). The defendant relies upon *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985), *cert. den.* ____U.S.____, 106 S.Ct. 183 (1986): *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 77 L.Ed. 2d 490 (1983).

The defendant contends that plaintiff cannot yet bring a federal cause of action against the plan under ERISA since they have failed to exhaust available "interfund" remedies as required by 29 U.S.C. § 1133. The defendant states that this section requires that every employee welfare plan "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." The defendant states that this employee stock investment plan has such a remedy and that plaintiffs have failed to allege that they have exhausted said remedies before resorting to suit.

The affidavit of Robert Crosby, Director of Human Resources at P*I*E, is attached to the defendant's motion,

and Mr. Crosby attests that none of the plaintiffs have filed a claim in accordance with the available interfund remedies. Therefore, it is argued that plaintiffs' complaint is premature and should be dimissed, citing *Taylor v. Bakery and Confectionary Union*, 455 F.Supp. 816 (E.D. N.C. 1978).

In addition, defendant states that because of plaintiffs' failure to exhaust interfund remedies and their reliance on the Court's diversity jurisdiction, plaintiffs' complaint cannot be construed as having alleged a cause of action under ERISA. The defendant also argues that the complaint is procedurally defective inasmuch as the averments are not made in numbered paragraphs, and the contents of each averment, as far as practicable, is not a statement of a single set of circumstances, but that the complaint is a confusing mishmash of legal claims and factual allegations. The defendant relies upon Rule 10(b), *Federal Rules of Civil Procedure.*

The defendant also argues that the plaintiffs' claim of fraud has not been properly alleged as required by Rule 9(b) of the *Federal Rules of Civil Procedure,* since the allegations fail to set forth with particularity any circumstances which support a claim of fraud. The defendant also states that plaintiff's allegations with respect to coercion, misrepresentation and promissory estoppel, as well as recision, are not supported by any of the factual averments contained within the complaint, and should accordingly be dismissed.

Finally, defendant states that plaintiffs' allegation of lack of consideration for the investment plan is contrary to the uncontorverted facts inasmuch as since the date of the plan implementation, plaintiffs have invested with, and accordingly been credited with, stock ownership consistent with their pledges. The defendant argues that this portion

of the complaint should be summarily adjudged in defendant's favor.

Plaintiff has responded and argues that this lawsuit raises the issue of whether or not there was a valid contract between the parties binding the plaintiffs to the stock option plan in question, and that they assert that the defendant's conduct in coercing the plaintiffs to participate in the plan voids any contract *ab initio* and, therefore, the state action for fraud is not in any way related to the employee benefit plan and, therefore, the preemption doctrine is not applicable to this cause of action. The plaintiff cites *Cattin* v. *General Motors Corp.*, 612 F.Supp. 948 (W.D. Mich. 1985).

Background Facts

The defendant, P*I*E* Nationwide, Inc., is a long-distance, over-the-road, cargo carrier, operating in interstate commerce, and in Canada, and has somewhat more than 11,000 employees and maintains a network of over 300 terminals. *See* Exhibit A attached to Affidavit of Robert Crosby, attached to the Motion to Dismiss. The defendant is a wholly-owned subsidiary of IU International Corp., a diversified services company.

During 1984, and for the first half of 1985, the defendant experienced gigantic financial losses and apparently was in some difficulty. *See* Exhibit A attached to Crosby Affidavit, p. 5. The company decided to offer to its employees a stock investment plan in August 1985, and the plan was designed to enable employees to acquire stock ownership in the company, and to provide employees who participated with the opportunity to accumulate capital for their future economic security. Crosby Affidavit, p. 2. The plan was subject to the provisions of ERISA, and a pro-

spectus was issued and published. *Id.*, Exhibit A. All potentially eligible employees were provided with a brochure extensively describing the plan, its purposes, eligibility criteria, and all other relevant terms and conditions. *Id.*, Exhibit B.

An employee eligible to participate in the plan had to voluntarily agree to accept an irrevocable 15 percent reduction in wage or salary from the start of the program through December 31, 1990. *Id.*, Exhibit A. Collective bargaining unit employees whose wages were between 90 and 100 percent of the standard contract rate could participate with an irrevocable 5 percent reduction in wages or salary through the same date. *Id.*, at 2.

The plaintiffs are employees of the defendant and are stationed at its Nashville terminal. Bobby Wayne Perry has been employed since September 1973, Philip Anthony Eddie since April 5, 1978, Ernest Cordell Jones since June 4, 1973, James H. Mathis since May 1972, and Gary R. Hyder since July 1973. On September 23, 1985, Mr. Jones elected to participate in the stock investment plan and signed an agreement to do so, which states as follows:

> I understand and agree that participation in the Compensation Program means that my wages or salary (as now or hereafter in effect) will be reduced by 15 percent beginning on the date the Compensation Program becomes effective, continuing through December 31, 1990.
>
> I acknowledge receipt of a Prospectus relating to the offering of Ryder/P-I-E Common Stock under the Stock Investment Plan and the Compensation Program.

> I elect to participate in the Compensation Program and in the Stock Investment Plan of Ryder/P-I-E Nationwide, Inc.

Id., Exhibit F.

On September 28, 1985, Mr. Eddie elected to participate and signed a similar agreement. *See Id.*, Exhibit E. On October 3rd, Mr. Hyder elected and signed the same agreement. *Id.*, Exhibit H. On October 25th, Mr. Mathis signed this agreement. *Id.*, Exhibit G. Finally, on November 14, 1985, Mr. Perry made the same election and signed the agreement. *See Id.*, Exhibit D.

The stock investment plan provided that the plan was conditioned upon at least 70 percent of the company's 11,000 eligible employees electing to participate in the plan. A total of approximately 85 percent of the eligibile employees did in fact elect to participate, and the plan took effect. *Id.*,p. 2, 3. According to Mr. Crosby's affidavit, once an employee agrees to the salary reduction and to participate in the plan, he must do so for the full program period, or until employment is terminated or he retires or dies, whichever first occurs. The wage reduction election may not be revoked or changed during participation. *Id.* In addition, the plan contains no provision for early employee withdrawal from the plan. The salary and wage reduction was intended to be irrevocable and to continue as provided in the election contract, and Mr. Crosby attests that no participant in the plan has been allowed to withdraw from it, nor has any employee been given a rebate or reinstatement of their reduced salary. *Id.*, at 5.

On May 8, 1986, the plaintiffs filed this complaint and allege that the defendant company was sold to Maxitron, Inc. on or about January 1, 1986. They also allege

that in August of 1985 the stock investment plan was proposed and they seemed to agree more or less with the terms of the plan as stated by Mr. Crosby in his affidavit. They also allege that they elected to participate in the plan, but their decision to do so was the result of threats and coercive statements made by representatives of the defendant. They also allege that they relied upon certain misrepresentation made by representatives of the defendant. They allege that they were told that if they did not participate in the plan the defendant would be forced to close its business and each of the plaintiffs would lose their job. They also allege that those employees who elected not to participate in the plan would not be allowed to continue to work for the defendant. They allege that they were told that the defendant corporation would not be sold. Complaint at 2, 3. The plaintiffs seek an order of the Court declaring their election to participate be declared void because it was obtained by fraud, coercion, and misrepresentation, and that all monies withheld from their wages or salaries be ordered returned to them plus prejudgment interest. The plaintiffs also seek punitive damages.

There does not appear to be any dispute that the defendant's stock investment plan involved in this litigation qualifies as an employee benefit plan within the meaning of ERISA. As such, the defendant's argument is that the plan is subject to the various requirements concerning participation, funding and investing requirements as provided in ERISA. *See* 29 U.S.C. §§ 1051-1086.

Discussion

ERISA is a far-reaching and comprehensive piece of legislation, and subjects employee benefit plans providing for fringe benefits to employees to certain federal regulations. The Act was designed "to promote the interest of

employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc., supra* at 90. The court went on to explain the Act as follows:

> It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans. . .ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.

Id., at 91.

ERISA is a complicated piece of legislation. Title I, 29 U.S.C. § 1001 *et seq.*, provides that administrators of all covered pension plans must file periodic reports with the Secretary of Labor, prescribes minimum participation requirements, vesting and funding schedules, and establishes standards of fiduciary conduct for plan administrators and for civil and criminal enforcement of the Act. Other portions of the Act, *see* Title II, amended various provisions of the Internal Revenue Code, and established the qualification of pension plans for special tax treatment so that such plans could conform to the standards set forth in Title I of the Act.

The Congress considered it imperative that participants have legal remedies to protect their rights and secure redress for any violations of the Act. *Laborers Fringe Benefit Funds* v. *Northwest Concrete & Construction, Inc.*, 640 F.2d 1350, 1352 (6th Cir. 1981). In addition, in order to promote uniformity of administration of such plans, Congress enacted a preemption provision, prohibiting application of any state law which "relate[s]" to any benefit plan.

Title 29 U.S.C. § 1144(a) provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

The Act defines the term "State law" as including "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

The Supreme Court in construing this provision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 68 L.Ed. 2d 402 (1981), stated at 522 as follows:

> To resolve retirees' claim that this state policy should govern we must determine whether such state laws are preempted by ERISA. Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system. Although the Supremecy Clause invalidates state laws that "interfere with, or are contrary to, the laws of Congress . . .," *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824), the "exercise of federal supremecy is not lightly presumed," *New York State Dept. of Soc. Services* v. *Dublino*, 413 U.S. 405, 413 (1973) quoting *Schwartz* v. *Texas*, 334 U.S. 199, 203 (1952). As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " [citation omitted].

The Court noted that Congress had in fact enacted a preemption provision in ERISA and stated as follows:

> But for the preemption provision to apply here, the New Jersey law must be characterized as a state law "that relate[s] to any employee benefit plan." 29 U.S.C. § 1144(a) (1976). [footnote omitted]. That phrase gives rise to some confusion where, as here, it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans. The New Jersey law governs the State's workers' compensation awards, which obviously are subject to the State's police power.

Id., at 523, 524.

The Court held that the New Jersey statute which prohibited workers' compensation benefits from being integrated with retirement benefits was preempted by § 1144(a) because it conflicted with a provision in ERISA which permits integration. The Court concluded that the state statute was related to the manner in which ERISA benefits are calculated, a matter covered by the Act. New Jersey could not intercede in that process. In *Blakeman* v. *Mead Containers*, 779 F.2d 1146 (6th Cir. 1985), the court held that common law causes of action for breach of contract were preempted by ERISA "when the claims arise from the administsration of such plans." *Id.*, at 1151, quoting from *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). The court affirmed summary judgment dismissal of state common law causes of action because those claims involved the administration of an employee benefit plan because the plaintiffs sought to recover benefits provided in the employee welfare benefit plan set up by the plaintiffs' employer.

In *Scott v. Gulf Oil Corp., supra*, the Court noted that the preemption provision was quite broad, but not all encompassing. *Id.*, at 1504. The court held that the preemption provision in ERISA extended to state common law causes of action and that "claims brought under state law doctrines that do not explicity refer to employee benefit plans are nonetheless preempted when the claims arise from the administration of such plans." *Id.*. The court cited *Blau* v. *Del Monte Corp., supra*, the case relied upon by the defendant.

The plaintiff brought an array of common law causes of action, and the court allowed plaintiff to proceed on those claims based on unauthorized negotiations and coercion as a result of which the plaintiffs allege they were denied benefits that they would have accumulated while working for their former employer's successor. The Court held that plaintiffs were neither participants or beneficiaries of the plan and they were not suing for any benefits under a plan. *Id.*, at 1505.

In *Blau* the plaintiffs had alleged both ERISA causes and state law causes of action, among them breach of contract implied in fact, promissory estoppel, estoppel by conduct, fraud and deceit, and breach of contract. The court affirmed the dismissal of the state common law causes of action apparently because the plaintiffs were in fact seeking benefits under the employee welfare plan involved in the litigation. *Id.*, at 1350, 1356.

It is therefore the conclusion of the undersigned that the preemption provision applies to state causes of action no matter what the subject matter of the cause may be or what the cause of action may be referred to if the plaintiff is a participant in a plan and he seeks to determine his entitlement to benefits or he seeks determination of the

amount of his benefits. Any state cause of action, whether common law or statutory, which affords a plan participant a remedy for determining any of these issues is a State law which relates to the administration of a plan and is preempted by § 1144(a). However, in light of the Supreme Court's admonition that supremacy of federal law is not "lightly presumed," it is my conclusion that § 1144(a) does not preempt these causes of actions raising issues about the manner in which this defendant procured plaintiffs' agreements to withhold money from their pay. I do not believe that these causes relate to the administration of the plan involved, nor are the plaintiffs seeking benefits under the plan. They say their agreements to join are void, or voidable, and they seek only those amounts withheld from their pay. Certainly, Tennessee has a great interest in the policing of contract negotiations and nullifying those contracts entered into in this state which were obtained by fraud or misrepresentation.

The civil enforcement provisions of ERISA seem to indicate that the preemption provision should extend no further than as described above. In 29 U.S.C. § 1132(a), Congress has provided for civil enforcement of ERISA and provides that a civil action may be brought by a "participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under terms of the plan . . . ." This provision fails to provide a remedy to individuals who may claim that they were fraudulently induced or coerced into joining a plan in the first place. The Court has not been cited to any provision of the Act that would afford such relief to an individual. It stands to reason that if a person is not a participant in the plan or he does not seek benefits provided in the plan, nor does he desire to clarify his right to future benefits, nor to enforce any right under the terms of the plan, then

§ 1144(a) would not apply to his common law causes of action to determine whether or not he was coerced to join the plan or whether his employer practiced fraud or misrepresentation in order to obtain his participation. This case is more similar to the facts in *Scott* v. *Gulf Oil Corp., supra,* than to *Blau, supra.*

Because these plaintiffs are not seeking benefits nor the determination of the amount of benefits, nor are they threatening the administration of this plan, I conclude that they are not required to pursue "interfund" remedies.

RECOMMENDATION

Having concluded that the plaintiffs' civil action is not preempted, the undersigned recommends that the defendant's motion to dismiss (or for summary judgment) be denied. However, the undersigned does agree with defendant that plaintiffs' complaint needs some revision to clarify the various claims. It is the recommendation of the undersigned that defendant's motion to dismiss based on objections to the complaint's style be denied provided plaintiffs file an amended complaint which complies with the pleading rules within twenty (20) days.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this report, or the proposed findings or recommendation to which objection is made. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas*

v. *Arn*, __,U.S.__, 106 S.Ct. 466, 475 (1985); *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

/s/ illegible

UNITED STATES MAGISTRATE

APPENDIX C

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

OFFICE OF THE CLERK
800 UNITED STATES COURTHOUSE
NASHVILLE, TENNESSEE 37203
(615) 736-7178

Received
AUG 14 1987

DATE: 8-12-87
RE: 3:86-0423-Higgins

Enclosed is a copy of the following:

MEMORANDUM & ORDER

entered on the docket by the Clerk in compliance with Rule 58 and/or Rule 79(a) of the Federal Rules of Civil Procedure on

8-12-87

CLERK, U.S. District Court

by: BARBARA VAUGHN
Deputy Clerk

Copies sent to:

Lara W. Short
Thomas Donnell, Jr.
Peter Reed Corbin

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BOBBY WAYNE PERRY, ET AL.	]	
	]	
v.	]	No. 3-86-0423
	]	Judge Higgins
P-I-E NATIONWIDE, INC.	]	

ORDER

In accordance with the memorandum contemporaneously filed, the defendant's objections to the Magistrate's Report and Recommendation (filed November 25, 1986) are denied and the Magistrate's findings and conclusions are adopted and approved in all regards. Accordingly, the defendant's motion to dismiss is therefore denied.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
8-11-87

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a) FRCP on 8-12-87. By: BJV

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BOBBY WAYNE PERRY, ET AL.	]	
	]	
v.	]	No. 3-86-0423
	]	Judge Higgins
P-I-E NATIONWIDE, INC.	]	

MEMORANDUM

On May 8, 1986, the plaintiffs, Bobby Wayne Perry, Phillip Anthony Eddie, Ernest Cordell Jones, James H. Mathis and Gary R. Hyder (plaintiffs) brought this action against P-I-E Nationwide, Inc. (PIE). All of the plaintiffs are citizens and residents of the State of Tennessee and were citizens at all times pertinent to the facts in this action. The defendant PIE is incorporated under the laws of the State of Florida with its principal place of business outside of Tennessee. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1332. The plaintiffs allege in their original complaint that they were induced to participate in a stock investment plan as a result of fraud, coercion, misrepresentation, promissory estoppel, recission, lack of consideration and breach of fiduciary duty. The plaintiffs request that the contract they signed be declared void and that the monies invested under the contract be returned to them, plus interest. The plaintiffs also request punitive damages. On July 2, 1986, the defendant filed a motion to dismiss or, in the alternative, a motion for summary judgment. The defendant asserts in its motion that the plaintiffs' common law cause of action outlined in their com-

plaint was preempted by the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001,*et seq.*, a federal statute. In its motion, the defendant also contends that the defendant's employee stock investment plan is an Employee Stock Ownership Plan (ESOP) as contemplated under ERISA, 29 U.S.C. § 1107(d)(6), and the Internal Revenue Code 26 U.S.C. § 4975(e)(7). The defendant, relying on *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 183 (1986); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed.2d 490 (1983) argues that since the stock investment plan is a benefit plan subject to ERISA's coverage provisions the plaintiffs' state law claims are preempted by 29 U.S.C. § 1144(a).

By order entered August 11, 1986, this action was referred to the Magistrate for a determination of whether to dismiss this action or, in the alternative, to grant summary judgment. Oral argument on the defendant's motion was heard by the Magistrate on Monday, October 20, 1986.

The Magistrate's Report and Recommendation (Report) was filed on November 25, 1986. The Magistrate found that 29 U.S.C. § 1144(a), the preemption provision of ERISA, applies to state causes of action no matter what the subject matter of the cause may be or what the cause of action may be referred to if the plaintiff is a participant in the plan and seeks to determine his entitlement to benefits or seeks a determination of the amount of his benefits. The Magistrate further concluded that § 1144(a) does not preempt the causes of action that deal with issues about the manner in which this defendant procured the plaintiffs' agreements to withhold money from their pay. The Magistrate further found that the plaintiffs' cause of action did not relate to the administration of the ESOP, nor

are the plaintiffs seeking benefits under the stock option plan. Section 1144(a) does not apply to the common law causes of action to determine whether or not the plaintiffs were coerced by fraud or misrepresentation to join the benefit plan. Therefore, the Magistrate recommended that the motion to dismiss or for summary judgment be denied.

The defendant filed its objections to the Report on December 10, 1986. The plaintiffs filed a response to the defendant's objections to the Report on December 18, 1986. On January 20, 1987, this Court heard argument on the Report. All of the objections go to pages 14-16 of the Report. The defendant found nothing wrong with the first 13 pages of the Report. The facts as found by the Magistrate are therefore not in dispute.

The defendant, in its memorandum, conjunctively addresses its first three objections to the Report by asserting that the Magistrate gave too narrow a reading to the preemption provisions of ERISA. The defendant argues that the broad preemption provisions of ERISA clearly apply to issues about the manner in which this defendant procured the plaintiffs' agreement to withhold money from their pay. The defendant also argues that this is an ESOP and ERISA therefore controls this action.

In order to promote uniformity in the administration of employee benefit plans under ERISA Congress enacted a preemption provision that prohibits the application of any state law which "relates" to the benefit plan. Title 29 U.S.C. § 1144(a) provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

> hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Therefore, a state law which relates to an employee benefit plan is preempted by ERISA. The case law has helped to clarify the meaning of the term "relates to." It has clarified the fact that ERISA preemption is not limited to state law claims which are specifically designated to affect employee benefit plans. Preemption of state law claims by ERISA depends on the conduct to which such law is applied, not the form or label of the law. *See Shaw v. Delta Airlines,* 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed.2d 490 (1983). Common law causes of action for breach of contract are preempted by ERISA "when the claims arise from the administration of such plans." *Blakeman v. Meade Containers,* 779 F.2d 1146, 1151 (6th Cir. 1985), citing *Scott v. Gulf Oil Corp.,* 754 F.2d 1499, 1504 (9th Cir. 1985). Therefore, in determining whether each of the plaintiffs' claims is preempted by ERISA, the Court must inquire as to whether the conduct challenged by the claim was part of the administration of the employee benefit plan. If the plaintiff is seeking a remedy that deals with the administration of the ERISA plan, benefits under the plan, or misconduct growing out of the administration of the ERISA plan, then the plaintiffs' state law cause of action is preempted by the federal statute. *See Arthur [sic] v. Ginsberg,* 757 F.2d 796 (6th Cir. 1985), *cert. denied,* 106 S. Ct. 208 (1985). As the Magistrate found, there is no dispute that Congress intended a broad application of preemption by ERISA of state law to eliminate the threat of conflicting or inconsistent state and local regulation. *Shaw, supra.,* 463 U.S. at 99. However, ERISA was not intended to preempt state or local laws that do not relate to the administration of an employee benefit plan or deal with benefits under such a plan.

The Magistrate was correct in his conclusion "that the preemption provision applies to state causes of action no matter what the subject matter of the cause may be or what the cause may be referred to if the plaintiff is a participant in a plan and he seeks to determine his entitlement to benefits or he seeks determination of the amount of his benefit." Preemption by ERISA only applies once the benefit plan is in existence. It does not apply to the common law actions of fraud, misrepresentation, etc., in order to get the plaintiffs to join the plan. Joining a plan is not the same as administration under the plan. The Court agrees with the Magistrate's finding that "§ 1144(a) does not preempt these causes of action raising issues about the manner in which the defendant procurred the plaintiffs' agreements to withhold money from their pay." The Report does not apply a narrow and strained application of the ERISA preemption provision. The plaintiff's cause of action does not deal with the administration of a benefit plan as regulated by ERISA but rather the plaintiffs' cause of action deals with activity on the defendant's behalf before the benefit plan was effectuated. The defendant's first three objections are without merit.

In its memorandum of law in support of its objections to the Report, the defendant addresses objections numbers four and five concurrently by maintaining that the plaintiffs' cause of action clearly "relates to the administration of the plan involved. . ." The Court will also address the defendant's objections numbers four and five together. For the reasons stated above, ERISA regulates the administration of the employee benefit plan. The defendant's activity which is challenged by the plaintiffs' claim was not part of the administration of the plan but rather fraud in the inducement to participate in the plan. The Court affirms the Magistrate's finding and concludes that the defendant's insistence is incorrect. The defendant

insists that inducement to participate in an employee benefit plan directly relates to the administration of the plan. The planitiffs' cause of action in the case at bar is not governed by the federal ERISA statute. The defendant's action occurred prior to the commencement of the retirement benefit plan.

The defendant's sixth objection to the Report is that "the Magistrate's reading of the civil enforcement provisions of ERISA is too constrained and restricted to accomplish the clear statutory objectives sought to be accomplished by the Act." The defendant does not dispute the fact that Section 1132(a) provides a participant in an ERISA plan with the right to bring a civil action to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan. The defendant is confusing joining a plan with rights under the terms of a plan. The plaintiffs are not asking for clarification of their rights to benefits under the terms of the plan. There is no dispute about this issue; the employee benefits are clearly understood. The thrust of the plaintiffs' allegations are to the effect that they were fraudulently induced to join the plan. The plaintiffs make no allegations concerning the administration of the plan. The defendant has failed to acknowledge that fraudulent inducement to join an employee benefit plan is not administration under the plan which is governed by ERISA. The defendant's sixth objection to the Report is without merit.

In its seventh objection, the defendant asserts that the Magistrate's conclusion that the ERISA civil enforcement provision "fails to provide a remedy to individuals who may claim that they were fraudulently induced or coerced into joining a plan in the first place" is erroneous. The Magistrate supports his conclusion by aptly pointing out that the Court was not cited to any provision of the Act

which would afford such relief to an individual. The legislative history of ERISA does not address whether or not the broad preemption provisions of ERISA were intended by Congress to preempt a state law based claim of fraudulent inducement to participate in an employee benefit plan.[1]

This Court is aware that ERISA effectively excludes all state participation in the regulation of employee benefit plans. The Magistrate is not denying or ignoring the breadth of the federal preemption intended by Congress. In his Report, the Magistrate clearly recognized the broad preemptive purpose of the legislation to regulate benefit plans. This regulation is reflected in the Act's history. Representative Dent, in referring to the preemption during debates on the bill, comments: "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to federal authority the sole power to regulate the field of employee benefit plans." 120 Cong. Rec. 29197 (1974). This clearly indicates that regulation is to be of the benefit plans and that no remedy is mentioned that deals with individuals who were fraudulently induced to join the plan, *i.e.* , activity before the plan was in place.

There is also no case law that supports the defendant's proposition that fraudulent inducement to join an employee benefit is governed by ERISA. The Court concludes that the defendant's proposition is too broad and is without merit. The preemption provision deals with administration of a benefit plan. *See Blakeman v. Meade Containers,* 779 F.2d 1146, 1151 (6th Cir. 1985); *Arthur [sic] v. Ginsberg,* 757 F.2d 796 (6th Cir. 1985), *cert.*

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[1] *See* the legislative history of Public Law 93-406.

denied, 106 S. Ct. 208 (1985).

PIE's objection number eight grows out of objection number seven. The defendant asserts that the Magistrate's reiteration that section 1144(a) does not apply to a state law based cause of action "to determine whether or not. . .[employees were] coerced to join the plan or whether his employer practiced fraud or misrepresentation in order to obtain. . .[their] participation" is erroneous. The defendant objects alleging that § 1132(a) affords the plaintiffs an exclusive remedy and that § 1144(a) does apply.

Section 1132 is the civil enforcement provision for ERISA. It outlines civil causes of actions that persons are empowered to bring. A participant, beneficiary, or fiduciary can enjoin any act or practice which violates a provision of this subchapter or terms of the plan, obtain appropriate equitable relief to redress a violation or enforce any provision of this subchapter or terms of the plan. An administrator's failure or refusal to comply with a request for any information also constitutes activity which would allow a participant, beneficiary or fiduciary to bring a civil action. 29 U.S.C. § 1132(c). An administrator is a "person specifically designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i). PIE cannot be classified as an administrator for its activity prior to the institution of the employee stock option plan.[2] Therefore, Section 1132(a) is not applicable to this action. This action does not deal with an administrator's or fiduciary's duties or breach of duties under the plan but rather deals with, as stated above, activity on

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[2] ERISA govens ESOP when it deals with the vesting and funding, as well as fiduciary and disclosure requirements, all of which are a part of the administration of the plan.

the part of the defendant before the plan was instituted. The plaintiffs do not contest the administration of the plan once the plan had been instituted. The plaintiffs contest the activity on the defendant's behalf before the institution of the plan. Therefore, the defendant's objection number eight to the Magistrate's Report is without merit. As the Magistrate found, neither § 1132(a) nor §1144(a) apply to the activity of the defendant before the institution of the employee benefit plan.

In objection number nine, the defendant contests the case law relied upon by the Magistrate. The defendant contends that the Magistrate is incorrect in his statement that "this case is more similar to the facts in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985) than *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985). Both *Scott* and *Blau* deal with preemption by ERISA of state law causes of action. Both cases stand for the proposition that the preemption provision applies to state causes of action no matter what the subject matter of the cause may be or what the cause of action may be referred to if the plaintiffs are participants in a plan and they seek to determine their entitlement to benefits or they seek a determination of the amount of their benefit under the plan. *Scott* at 1504; *Blau* at 1356. ERISA deals with the administration, reporting, disclosure, funding, vesting, and enforcement of benefit plans. The damages claimed by the plaintiffs must be a benefit under a plan to constitute an ERISA action. *Scott* at 1505. Because of the nature of a claim under ERISA and the facts in the case at bar, this Court concurs in the Magistrate's analysis that the facts in this case are more similar to the facts in *Scott* than *Blau*.

Scott relied on the concept stated in *Blau* that "once established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether

the employer complies with the administrative and reporting requirements detailed under ERISA." *Blau* at 1352. Reiterating the point, if the benefit plan has been established then the employee's state law claim is preempted by ERISA. In *Blau*, the plaintiff's state law claims were preempted by ERISA because they arose once the plan had been established. However, this is not the situation in the instant case. *Scott* addressed the issue of participants and beneficiaries by finding that if an individual is neither a participant nor beneficiary then he does not fall within the sphere of ERISA. The alleged misconduct of PIE occurred before the instigation of the benefit plan. The plaintiffs in this action were not participants or beneficiaries of the plan and are not suing for any benefit under a plan. *See Gulf* at 1505.

The defendant's tenth objection to the Magistrate's Report is that the Magistrate's conclusion that "[b]ecause these plaintiffs are not seeking benefits nor the determination of the amount of benefits, nor are they threatening the administration of this plan, I conclude that they are not required to pursue 'interfund' remedies." This Court has already concurred in the Magistrate's determination that the plaintiffs' state law cause of action is not preempted by ERISA because their cause of action arose before they were participants in the benefit plan and their claims are not brought under their participation in a benefit plan.

Lastly, the defendant objects to the Magistrate's conclusion that this civil action is not preempted and that the defendant's motion to dismiss (or for summary judgment) be denied. The Magistrate thoroughly examined and discussed the preemption issue of state law claims under ERISA. The Court finds, as supported above, that the Magistrate's determination was based on full consideration of the issues. This Court concludes that the defend-

ant's last objection is without merit and that the Magistrate's finding is correct. The evidence in the case at bar reveals that the plaintiffs' claims are not preempted by ERISA.

The Court concludes that all of the defendant's objections are without merit and in no way invalidate the Magistrate's Report. The Court therefore adopts and approves the Report in its entirety.The defendant's motion to dismiss is therefore denied.

An appropriate order will be entered.

/s/ Thomas A. Higgins

Thomas A. Higgins
United States District Judge
8-11-87

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

OFFICE OF THE CLERK
800 UNITED STATES COURTHOUSE
NASHVILLE, TENNESSEE 37203
(615) 736-7178

DATE: 9-21-87

RE: 3:86-0423-Higgins

Enclosed is a copy of the following:

ORDER

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entered on the docket by the Clerk in compliance with Rule 58 and/or Rule 79(a) of the Federal Rules of Civil Procedure on

9-21-897

CLERK, U. S. District Court

BY: BARBARA VAUGHN
DEPUTY CLERK

Copies sent to:

Lara Short
Thomas Donnell, Jr.
Peter Reed Corbin

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BOBBY WAYNE PERRY, ET AL.	]	
	]	
v.	]	No. 3-86-0423
	]	Judge Higgins
P*I*E NATIONWIDE, INC.	]	

ORDER

The defendant's motion (filed August 26, 1987) to amend the order entered August 12, 1987, is granted, and the order is amended so as to provide:

> The Court is of the opinion that this order, entered August 12, 1987, denying the defendant's motion to dismiss involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

It is so ORDERED.

/s/ Thomas A. Higgins

Thomas A. Higgins
United States District Judge
9-17-87

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a) FRCP on 9/21/87. By: BJV

APPENDIX E

No. 87-6321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOBBY WAYNE PERRY, ET AL., Plaintiffs-Appellees, v. P*I*E NATIONWIDE, INC., Defendant-Appellant	FILED MAY 25 1989 ORDER

BEFORE: **WELLFORD and NELSON, Circuit Judges; and McQUADE*, United States District Judge**

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Richard B. McQuade sitting by designation from the Northern District of Ohio

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

No. 89-324

In The

Supreme Court of the United States

October Term, 1989

P*I*E NATIONWIDE, INC.,

Petitioner,

v.

BOBBY WAYNE PERRY, PHILIP ANTHONY EDDIE, ERNEST CORDELL JONES, JAMES A. MATHIS and GARY R. HYDER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN D. SCHWALB
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Counsel for Respondents

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14 pp

QUESTION PRESENTED FOR REVIEW

Whether the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1144 (a), precludes Tennessee State law causes of action against the employer for fraud in the inducement, coercion and misrepresentation with regard to acts leading up to, but prior to the actual commencement or establishment of an employee stock ownership plan (ESOP)?

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STATUTES

COUNTER-STATEMENT OF THE CASE

This action was brought in 1986 by the respondents in the United States District Court for the Middle District of Tennessee at Nashville based upon diversity of citizenship. The respondents are citizens and residents of the State of Tennessee. The petitioner, their employer, is a Florida corporation. The Complaint asserted that P*I*E wrongfully induced respondents to participate in an employee stock investment plan contrary to Tennessee state common law. Respondents also allege that their participation in the stock investment plan was obtained through fraud, coercion, misrepresentation, promissory estoppel, lack of consideration and breach of fiduciary duty. Respondents sought rescission, refund of the monies which were withheld from them and damages.

P*I*E filed a motion to dismiss alleging that the ESOP was a plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001, *et seq.* and the Internal Revenue Code. As such, the petitioner asserted that its conduct is regulated under the terms of ERISA and Internal Revenue Code.

For purposes of this appeal, the factual background of this controversy is, as it relates to the motion to dismiss, undisputed. Prior to the offering of the stock investment plan to the respondents, P*I*E, a wholly owned subsidiary of I.U. International Corporation, a diversified service company based in Philadelphia, Pennsylvania, entered into negotiations for the sale of P*I*E to Maxitron, Inc.

As part of the terms and conditions of the sale it is believed that a precondition to the sale was that the

respondents and approximately eighty-five (85%) percent of other eligible employees elected to join and participate in the stock investment plan. In exchange for participating in the stock investment plan, employees had to agree to accept an irrevocable fifteen (15%) percent reduction in salary for a period of five (5) years beginning January 1, 1986, and ending December 31, 1990. Although the stock prospectus issued by P*I*E with the stock investment plan indicated there had been negotiations between P*I*E and Maxitron, it failed to disclose these preconditions for the sale.

The respondents were employees of P*I*E and were stationed at P*I*E's Nashville terminal. Bobby Wayne Perry had been employed since September, 1973, Philip Anthony Eddie since April, 1978, Ernest Cordell Jones since June, 1973, James H. Mathis since May, 1972 and Gary R. Hyder since July, 1973. On various dates prior to January 1, 1986, the actual day of which is not material for purposes of this appeal, the respondents signed the necessary documents to participate in the stock investment plan. Their signatures and election to enter the plan was obtained through coercive statements made by and through representatives of P*I*E and material misrepresentations made by representatives of P*I*E. There were misrepresentations in the plan prospectus and certain coercive actions taken by P*I*E including, but not limited to, termination of some employees who refused to join in the stock investment plan.

The District Court referred the petitioner's motion to Magistrate Kent Sandidge, III, for report and recommendations. Upon argument, Magistrate Sandidge recommended that the Motion to Dismiss be denied. *See,*

Appendix B, Petition for Writ of Certiorari, at A-15. The District Court accepted the ultimate recommendation of the magistrate but issued its own lengthy opinion denying the Motion to Dismiss and overruling the objections filed by the petitioner. *See, Id.*, Appendix C at A-30. The petitioner timely moved for the appropriate amendment to the Order so that interlocutory appeal could be sought. The respondents later joined in the Motion. The petitioner's request for permission to appeal was granted by the United States Court of Appeals for the Sixth Circuit. The Court of Appeals issued an opinion affirming the District Court finding that there was no ERISA preemption with respect to the fraud, misrepresentation, coercion and promissory estoppel claims of the respondent. The Sixth Circuit reversed the district court's decision on the issues of breach of fiduciary duty and lack of consideration.

The petitioner filed a timely Motion for Rehearing En Banc which was denied. *See, Id.* at A-45. Thereafter, the petitioner filed a Motion for Stay of the mandate to allow the adequate time to file the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT UNITED STATES COURT OF APPEALS IS NOT INCONSISTENT WITH COURT'S DECISIONS IN *SHAW V. DELTA AIRLINES* 463 U.S. 85 (1983), OR *PILOT LIFE INSURANCE COMPANY V. DEDEAUX* 481 U.S. 41 (1987).

It is certainly clear that Congress sought to preempt certain types of state regulation and state law based

claims against the fiduciaries of an employee benefit plan. Section 514 of the Employee Retirement Income Security Act provides in part:

> The provisions of the sub-chapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . .

29 U.S.C. Section 1144(a). Thus, it is clear that the broad preemptive provision does not preempt all state laws, rather it preempts them only insofar as the laws relate to, i.e. attempt to regulate the plan. This Court has given a very broad construction the term "relate to". However, the opinions of this Court have not been as broad as petitioner would suggest. *Mackey v. Lanier Collections Agency and Service, Inc.* 486 U.S. ___, 100 L. Ed. 2d 836 (1988). *Fort Halifax Packing Co., Inc. v. Coyne* 482 U.S. 1 (1987).

In the instant petition, the petitioner urges this Court to extend the preemptive scope of ERISA beyond what it has previously declined to do as noted in *Shaw v. Delta Airlines, Inc.* 463 U.S. 85 (1983). The retreat of the Court in *Shaw* is a recognition that the preemption of state law claims may indeed involve a two-pronged test for preemption. If the state law is independent of some other federal scheme, preemption exists. If, on the other hand, it is tied to some similar scheme, then preemption will exist only insofar as the law prohibits something which is lawful under ERISA. 463 U.S. at 108-109, *Alessi v. Raybestos Manhattan, Inc.* 451 U.S. 504, 524-525 (1981). Certainly, petitioners are not suggesting that their acts

which are illegal under Tennessee law would be legal within the federal law or regulatory scheme.

As noted in *Shaw*, state action and some state laws will affect employee benefit plans in a remote or peripheral manner. *Id.* 463 U.S. at 100, *See also, Mackey*, at 846.

This Court has held that certain criteria must be reviewed prior to a determination that preemption will be mandated.

> [W]hen Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law preempted by federal legislation whenever the "challenged state [law]" stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Perez v. Campbell* 402 U.S. 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1940).

Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U. S. 311, 317 (1981). As Congress has determined, the purpose of ERISA is not to protect the employer from an attack on its fraudulent acts, rather it is to protect the beneficiary or employee and to provide the appropriate *remedies* where necessary to accomplish this purpose. 29 U.S.C. Section 1001(b). Preemption of the respondents' claims would not be consistent with this objective nor the prior decisions of this Court.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THOSE OF THE OTHER CIRCUITS.

Petitioner argues that the Sixth Circuit now conflicts with numerous decisions of other circuit courts of appeal.

The opinion below, as demonstrated hereinafter, is not in conflict with those decisions relied upon by the petitioner.

In *Cefalu v. B. F. Goodrich Co.*, 871 F. 2d 1290 (5th Cir. 1989) the Fifth Circuit Court of Appeals held that the Plaintiff's claim to **recover additional pension benefits** was preempted. The basis of Cefalu's claim was that "representatives of Goodrich orally assured him that his '**retirement benefits**' would be greater that the amount ultimately provided to him." *Id.* at 1292 (emphasis added). The facts in the case at bar are clearly distinguishable from the *Cefalu* case in that Mr. Cefalu sought greater benefits and an oral modification of a plan. The oral modification, alone, conflicts with ERISA. *Id.* at 1296-97, *see, also,* 29 U.S.C. Section 1102(a)(1).

The respondents do not seek a modification of the plan in this case. The respondents seek rescission and money damages for the fraudulent and coercive conduct of the petitioner procuring their entrance into a plan that, but for the wrongful conduct, would not have existed.

In *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988), the Tenth Circuit Court of Appeals held that contractual claims for an increase in pension benefits were again preempted by ERISA. *Id.* at 1263-64. Again, the respondents in the case at hand are not seeking an increase in pension benefits, and *Straub* is not in conflict with the lower court's decision.

In *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987), the Eighth Circuit Court of Appeals held contractual claims to increase benefits were preempted by

ERISA. However, in so holding, the Court at the outset noted:

> In essence, Anderson's claim is that he is entitled, *as a matter of contract*, to have certain health benefits *added to his welfare benefit plan* which is applicable to him as a retired Morrell employee.

Id. at 873 (emphasis added). Holding the claim to be preempted, the court refused to draw a substantive distinction between "an action to recover benefits . . . and an action to establish . . . benefits." *Id.* at 875.

In *Farlow v. Union Central Life Insurance Co.*, 874 F.2d 791 (11th Cir. 1989), the Eleventh Circuit Court of Appeals held that claims of misrepresentation and negligence as to the benefits to be received and the insurance coverage that existed in a welfare benefit plan were preempted. Once again, however, is the distinction that the claim in *Farlow* was in regard to the benefits of the plan, not the inducement to join.

In its analysis, the Court explained that unlike state law claims not preempted by ERISA, "the conduct alleged . . . is not only contemporaneous with . . . but the alleged is intertwined with the refusal to pay benefits." *Id.* at 794. In the case at bar, the misconduct alleged is in no way related to a refusal to pay benefits. To the contrary, the respondents' claims involve the wrongful acts leading up to, but prior to, the formation of any benefit plan.

In affirming the District Court, the Sixth Circuit Court of Appeals followed the test set forth in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). *Perry v. P*I*E Nationwide, Inc.* 872 F.2d 157, 162 (6th Cir. 1989). In deciding that ERISA

provided no remedy for the wrongs committed by the Petitioner, the court held that the preemption provisions of ERISA were not applicable under these facts. *Id.* Important to the holding is the preemption of two claims which the court held did "relate to the plan." *Id.* Implicit in this holding is the recognition by the Court that if rescission is decreed by the district court, then the claims obviously do not relate to the plan. One cannot seek interfund remedies available only to participants if one is not a participant.

In summary, the holding by the Sixth Circuit Court of Appeals in this case does not represent a split of authority among the Circuits regarding the preemption provision of ERISA. The District and Appellate Courts found distinguishing facts prevalent in this action which justifiably preclude preemption of the respondents' claims.

The respondents' have not sought benefits under a plan nor "related to" a plan within the meaning of ERISA. The lower court's recognition of the claim of respondents is not in conflict with the prior decisions of this Court or any lower court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents Bobby Wayne Perry, Philip Anthony Eddie, Ernest Cordell Jones, James A. Mathis and Gary R. Hyder, respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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